

**STATE OF NEW MEXICO  
BEFORE THE WATER QUALITY CONTROL COMMISSION**

**IN THE MATTER OF:  
PROPOSED AMENDMENTS TO  
STANDARDS FOR INTERSTATE AND  
INTRASTATE SURFACE WATERS,  
20.6.4 NMAC**

**No. WQCC 20-51 (R)**

**TRIAD NATIONAL SECURITY, LLC  
AND THE UNITED STATES DEPARTMENT OF ENERGY'S  
NOTICE OF COMPILATION OF EVIDENCE**

Triad National Security, LLC and the United States Department of Energy, National Nuclear Security Administration (collectively "LANL"), in response to the Hearing Officer's request at the December 30, 2021 hearing on Amigos Bravos's Motions to Strike, hereby submit their Notice of Compilation of Evidence supporting LANL's final proposed language for 20.6.4.7.T(2) NMAC and for 20.6.4.14(A) NMAC. LANL has also provided its final proposed language for 20.6.4.7.T(2) NMAC and 20.6.4.14(A) NMAC by separate concurrent filing with this Notice.

**I. Definition of "Toxic Pollutants"**

In its Petition To Amend The Standards For Interstate And Intrastate Surface Waters (20.6.4 NMAC) And Request For Hearing ("Petition"), the New Mexico Environment Department ("NMED") proposed a number of revisions relating to toxic pollutants (e.g., adding definitions of Contaminants of Emerging Concern ("CEC") and "persistent toxic pollutants" at 20.6.4.7 NMAC and amending the General Criteria for toxic pollutants at 20.6.4.13 NMAC). In response, in its Public Comments, January 7, 2021 ("Original Proposal"), LANL proposed the following amendment to the definition of "toxic pollutants":

~~"Toxic pollutant" means those pollutants or combination of pollutants, including disease causing agents, that after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment~~

~~or indirectly by ingestion through food chains, will cause death, shortened life spans, disease, adverse behavioral changes, reproductive or physiological impairments or physical deformation in such organisms or their offspring listed by the EPA Administrator under section 307(a) of the federal Clean Water Act, 33 U.S.C. 1313(a) or in the list below.~~

LANL Original Proposal, Attachment 1, Comment 4.

In its Notice of Intent to Present Technical Testimony (“NOI”), filed May 3, 2021, and attached exhibits, LANL supported its proposal with the Direct Technical Testimony of Dr. David Bryan Dail, LANL Exhibit 5. Dr. Dail stated:

The listing of hundreds of possible contaminants by way of both (1) the broad group of CECs and (2) other Toxic Pollutants by the NMED’s invocation of the groundwater rules at 20.6.2 NMAC is problematic. The former lack aquatic life criteria, and the latter have some criteria, but they are not listed in 20.6.2 NMAC. The lack of numerical criteria leads to regulatory uncertainty and also bypasses the normal processes for the WQCC’s adoption of numeric criteria.

LANL Exhibit 5 (Dail Direct) at 7:14-19. Dr. Dail also stated that NMED could adopt a specific list and suggested the Clean Water Act 304(a) list as well as means to select from the list of groundwater toxic pollutants and, referencing LANL Exhibit 50, Dr. Dail stated that there are processes in place to identify criteria. He continued to express concern about a general reference.

NMED has at its disposal the adoption of existing 304(a) or other defensible guidance for many toxic pollutants listed in the groundwater rules. In fact, in adoption of the list only, there is some cross over between the current 20.6.4 NMAC and the groundwater rules, and the surface water rules currently have criteria they adopted via 304(a) guidance. Regarding methods for developing criteria for those CECs that lack current 304(a) guidance, there are processes in place to develop these as well, see LANL Exhibit 50. Without clearly stated criteria, it would be impossible to determine compliance with the narrative water quality standards (“WQS”) for CECs or evaluate reasonable potential in the context of an NPDES permit.

LANL Exhibit 5 (Dail Direct) at 9:18-21. Dr. Dail testified that “LANL proposes that the WQCC revise the definition of ‘Toxic pollutant’ at 20.6.4.7(T)(2) NMAC, to be consistent with 40 CFR 131.3(d).” LANL Exhibit 5 (Dail Direct) at 13:2-7.

In its NOI, filed May 3, 2021, New Mexico Mining Association (“NMMA”) supported LANL’s proposed amendment to the “toxic pollutants” definition, stating that “The current definition of ‘toxic pollutant’ set forth in 20.6.4.7(T)(2) NMAC creates regulatory uncertainty. The definition does not provide clarity regarding the pollutants the Department will require dischargers to address and treat as toxic. The current definition of ‘toxic pollutant’ is not consistent with the Clean Water Act and its implementing regulations.” NMMA NOI at 5-6. The San Juan Water Commission (“SJWC”), in its NOI, also filed May 3, 2021, objected to NMED’s proposal to include the groundwater toxic pollutants (20.6.2 NMAC) in the Surface Water Quality Standards (“Standards”) stating that “NMED has not even alluded to evidence that the water contaminants identified in 20.6.2.7(T)(2) NMAC meet the definition of “toxic pollutant” in the WQS.” SJWC NOI, SJWC Exhibit 2 (DeRose-Bamman Direct) at 17-18.

In its written rebuttal testimony, LANL supported its proposed amendment to the “toxic pollutants” definition with testimony from Dr. Dail and Nancy Judd. Specifically, Dr. Dail stated: “As in my prior testimony, I urge the WQCC to adopt LANL/Triad’s language, to reference the accepted EPA list of toxics set out in section 307(a) of the federal Clean Water Act, 33 U.S.C. § 1313(a) and provide a placeholder for the WQCC to add pollutants to the list through the rulemaking process.” LANL Exhibit 61 (Dail Rebuttal) at 6:11-14. Witness Judd explained:

This proposed definition provides certainty on the chemicals that are toxic pollutants and provides the numeric criteria for some of those chemicals directly in 20.4.6 NMAC, reducing confusion and regulatory uncertainty. The New Mexico Water Quality Control Commission (“WQCC”) can add to the list in 20.6.4.7(T)(2) NMAC and add numeric criteria for these toxic pollutants in 20.4.6.900 NMAC, as NMED has proposed to do for many other chemicals as part of the current Triennial Review process.

LANL Exhibit 65 (Judd Rebuttal) at 4:12-5:7. Ms. Judd also provided a basis for LANL's final proposal to including two per- and polyfluoroalkyl substances (PFAS) to be added to the definition, saying:

EPA has not developed human health criteria for any PFAS under Section 304(a) of the federal Clean Water Act, although scoping for the development of human health and aquatic life ambient water quality criteria for PFOA and PFOS is underway. LANL Exhibit 88. EPA is also moving forward with maximum contaminant level ("MCL") processes for drinking water for PFOS and PFOA under the federal Safe Drinking Water Act (LANL Exhibit 89). I recommend that New Mexico consider the implementation of EPA's MCL and human health ambient water quality criteria for PFAS for the appropriate uses (i.e., domestic water supply ("DWS") and Human Health Organism Only ("HH-OO")) when they become available and follow the process for adoption of criteria established in 20.6.4.13(F) NMAC.

LANL Ex. 65 (Judd Rebuttal) at 5:21-6:7. Referencing LANL Exhibit 57, Ms. Judd concluded her rebuttal testimony on this issue stating "I recommend that New Mexico consider the implementation of EPA's MCL and human health ambient water quality criteria for PFAS for the appropriate uses (i.e., domestic water supply ("DWS") and Human Health Organism Only ("HH-OO")) when they become available and follow the process for adoption of criteria established in 20.6.4.13(F) NMAC." LANL Ex. 65 (Judd Rebuttal) at 6:22-7:3. This testimony supports LANL's final inclusion of perfluorooctanoic acid ("PFOA") (CAS 335-67-1) and perfluorooctane sulfonate ("PFOS") (CAS 1763-23-1) and the footnote limitation that the PFAS compounds do not apply to waters with a limited aquatic life designated use.

In written rebuttal testimony, NMED, Amigos Bravos ("AB"), the Buckman Direct Diversion Board ("BDD"), and Communities for Clean Water and Gila Resources Information Project ("CCW/GRIP") all commented on LANL's proposed amendment. LANL's final proposed amendment to the "toxic pollutants" definition was based, in part, on responding to those comments that are briefly summarized here. NMED acknowledged that LANL (and NMMA)

based the proposed definition of “toxic pollutants” on the definition for toxic pollutants in 40 C.F.R. § 122.2. NMED Exhibit 107 (Barrios Rebuttal) at 7:16-19, referencing NMED Exhibit 137. Mr. Barrios identified twelve toxic contaminants not included on the Priority Pollutant List for which EPA has recommended criteria that are not yet adopted in 20.6.4.900 NMAC, noted that “EPA’s Integrated Risk Information System (“IRIS”) currently contains assessments for 571 substances, many of which do not have established numeric criteria guidance published by EPA, nor do they have numeric criteria adopted by New Mexico,” and expressed concern that “individual substances could be added to a toxic pollutant list, the process would be time-consuming and limit the Department’s ability to respond to new information.” *See* NMED Exhibit 107 (Barrios Rebuttal) at 6:16-7:5.

AB’s rebuttal testimony largely focused on the need to include PFAS compounds as toxic pollutants. *See* AB Exhibit 11 (Conn Rebuttal) at 5 (stating it is widely recognized by the scientific community that certain PFAS are toxic pollutants) and AB Exhibit 17 (DeWitt Rebuttal) at 3-5 (identifying certain PFAS compounds as toxic pollutants). BDD in its written rebuttal testimony expressed concern about limiting the list of toxic pollutants to a list, but agreed with LANL that listing contaminants of emerging concern is problematic. BDD Notice of Intent to Present Rebuttal Technical Testimony (“BDD Rebuttal NOI”) at 9-10.

While CCW/GRIP did not support LANL’s proposed elimination of the narrative portion of the toxic pollutant definition, CCW/GRIP did support adding at the end of the definition: “The term includes the toxic pollutants listed in the federal regulations at 40 CFR 401.15, and the groundwater quality regulations at 20.6.2.7.T(2) NMAC as those lists may be amended.” CCW/GRIP Exhibit 1 at 1-2. CCW/GRIP’s witness, Ms. Homer stated in her written rebuttal testimony:

I agree that lists are helpful. It is perhaps an oversight that the Standards currently do not specify which pollutants in 20.6.4.900 fall under the definition. It would be appropriate to reference the CWA list here. The toxic pollutant list from 20.6.2 NMAC could be referenced here as well. If that list from 20.6.2 NMAC is to be included, this is the better place for it than in the General Criterion for toxic pollutants at 20.6.4.13(F) as NMED has proposed.

CCW/GRIP Exhibit 5 (Homer Rebuttal) at 5-6.

At hearing, LANL supported what it subsequently developed as its final proposed language for 20.6.4.7.T(2) NMAC with the testimony of Dr. Dail, who clarified that LANL does not oppose individually identifying each toxicant from the list of toxic pollutants in the ground water regulations, 20.6.2.7 NMAC, so long as it is clear that applicability is limited to human health-related designated uses.

Q. With respect to the reference to toxic pollutant listed under the groundwater regulations, do you have any further comment about the propriety of including those as toxic pollutants for surface waters?

A. LANL has no objection as long as it is clear what uses are being protected in referencing a list that was designed to protect consumption -- human consumption and human health.

Tr., Vol. II, 505:19-506:1 (Dail). *See also* Testimony of Nancy Judd and Judd Demonstrative Exhibit at Slide 2.

The following testimony from NMED witnesses Shelly Lemon, Kris Barrios, and Jennifer Fullam provides additional support for LANL's final proposed language for 20.6.4.7.T(2) NMAC. The proposal is responsive to the testimony of Mr. Barrios that it was NMED's intention to include persistent toxics listed in 20.6.4.900.J NMAC within the definition of toxic pollutants under 20.6.4.T(2) NMAC and that NMED would be amenable to a proposal that clarified that intent:

BY MR. ROSE:

Q. Mr. Barrios, let me direct you to the proposed change to the definition of persistent toxic pollutants. I think that was the first topic you testified to. And it looks to me like even though toxic pollutants is in the title that the definition refers

to pollutants as opposed to toxic pollutants. Was it your intent that the term "persistent" toxics applied to contaminants or pollutants beyond those which were first toxic pollutants?

**A. The intent of the definition is to represent those chemicals identified in the table of numeric criteria, 20.6.4.900 NMAC.**

Tr. Vol II, 464:2-14 (Barrios Cross) (emphasis added).

Q. . . . In the Department's proposal, I think you testified to the reference to contaminants of emerging concern and a list of toxic pollutants in 20 – in 20.6.2 NMAC, did you not?

A. I did.

Q. And was -- were the references to contaminants of emerging concern in the toxic pollutant list intended to expand the definition of toxic pollutants, or was it intended to be illustrative of the -- of pollutants which could be considered toxic pollutants?

A. It's illustrative, does not expand the --

Q. Okay. And would you object if, for example, the Commission were to keep the current definition of toxic pollutants to including this -- this reference in the definition rather than in the narrative criteria? Because it looks like it really does modify toxic pollutants as they're defined rather than the numeric criteria or the narrative criteria in F.

A. The Department's intent is to illustrate CECs, provide information regarding CECs and where they may fall into the regulatory process. **Amendments that achieve that objective may be satisfactory to the Department.**

Tr. Vol II, 467:12-468:10 (Barrios Cross) (emphasis added).

LANL's revised proposed amendments to 20.6.4.T(2) NMAC are also supported by the following testimony from Mr. Barrios, which specifically supports the premise that the list of toxic pollutants from the groundwater standards 20.6.2 NMAC are "already covered" by the WQS:

[McCaleb] Q. Do you agree that the list of toxic pollutants in the Ground and Surface Water Protection rule, if it meets the definition of toxic pollutant in the surface water quality standards, then it would already be covered?

A. Yes.

Tr. Vol IV, 479:23-480:3 (Barrios Cross).

The following testimony from Mr. Barrios also supports LANL's proposal to include both persistent toxic pollutants and the toxic pollutants listed in 20.6.2 NMAC within the definition of toxic pollutants at 20.6.4.T(2) NMAC:

Q. Are persistent toxic pollutants in NMED's proposal meant to be a subset of toxic pollutants? So for example, are all persistent toxic pollutants also toxic pollutants?

A. Yes, they are.

Tr. Vol IV, 491:8-12 (Barrios Rebuttal).

Q. And are all toxic pollutants listed in 20.6.2 NMAC meant to be a subset of toxic pollutant as defined in 20.6.4.7 NMAC?

A. Yes.

Tr. Vol IV, 491:19-22 (Barrios Rebuttal).

LANL's revised proposed amendments to 20.6.4.T(2) NMAC are also in response to Ms. Lemon's testimony that NMED's proposal to add a reference to 20.6.2 NMAC within the definition of toxic pollutants was intended to clarify that compounds identified as toxic pollutants in the groundwater regulations should also be considered toxic pollutants for surface water, including certain PFAS compounds:

MR. ROSE: So is it your testimony that the Commission's determination with respect to which compounds are toxic pollutants under 20.6.2 equally applied to 20.6.4?

MS. LEMON: 20.6.2 equally applies to surface water. Yes.



...

MR. ROSE: Does the Department intend to provide guidance to the regulated community about the Department's determination that certain PFAS compounds, the three listed in 20.6.2, also apply to surface water discharges?

MS. LEMON: That's what we're attempting to do with these -- this Triennial Review, is to make that connection in 20.6.4 NMAC, by adding the reference to 20.6.2 NMAC.

MR. ROSE: So as I understand your testimony, the proposal to add the reference to 20.6.2 is informational or clarification of what you believe the rules already require?

MS. LEMON: Not what I believe, but what the rules require. Yes.

Tr. Vol III, 751:25-753:3 (Lemon Cross).

Additionally, LANL's revised proposed amendments to 20.6.4.T(2) NMAC are responsive, at least in part, to the following testimony from Ms. Fullam:

Q. Okay. Just a couple more questions. In Section 900J.(2), can you describe the Department's proposed amendments regarding the reference to persistent toxic pollutant?

A. Similar to the previous proposed amendment, the Department's proposing to consistently reference the term "toxic pollutant" in order to reduce confusion and aid in implementation. So in order to accomplish this, again we added the term "toxic pollutant" to complete the description of persistent toxic pollutants in the abbreviations for the numeric criteria table in Section J.(2)(d).

Q. And what was the reasoning for that?

A. Again maintaining consistency with language throughout the standards aids in proper implementation of the standards.

Tr. Vol IV, 1228:13-1229:3 (Fullam Direct).

## **II. 20.6.4.14(A) NMAC SAMPLING AND ANALYSIS**

In its NOI, LANL proposed the following amendments to 20.6.4.14(A) NMAC:

A. 40 CFR Part 136 approved methods shall be used to determine compliance with 12 these standards and in Section 401 certifications under the federal Clean Water Act. In all other cases, sampling ~~Sampling~~ and analytical techniques shall conform with methods described 14 in the following references unless otherwise specified by the commission pursuant to a petition 15 to amend these standards...

LANL NOI, Ex.1. Consistent with LANL's intent and in response to testimony and evidence presenting during these proceedings, for its revised proposed language for 20.6.4.14(A) NMAC, LANL proposed the following addition (underlining showing original proposal and bold showing addition):

A. 40 CFR Part 136 approved methods shall be used to determine compliance with these standards and in Section 401 certifications under the federal Clean Water Act. **In cases of pollutants or pollutant parameters for which there are no approved methods under 40 CFR Part 136, analyses shall be conducted according to a test procedure specified in the applicable permit or 401 certification. Where 40 CFR Part 136 approved methods are not required,** sampling and analytical techniques shall conform with methods described in the following references unless otherwise specified by the commission pursuant to a petition to amend these standards: . . . .<sup>1</sup>

Dr. Toll supported LANL's proposed amendment to 20.6.4.14(A) in LANL's NOI, stating that "each NPDES permit includes requirements to monitor compliance with effluent limitations "[a]ccording to test procedures approved under Part 136 for the analyses of pollutants having approved methods under that part, and according to a test procedure specified in the permit for pollutants with no approved methods." LANL Exhibit 7 (Toll Direct) at 6:10-14. Dr. Toll referenced 40 CFR 122.44(i)(1)(iv) and LANL Exhibit 52 in further support and later explained that the basis for the recommended change to 20.6.4.14 NMAC was twofold: "to ensure

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<sup>1</sup> Note that, in light of the strenuous objection made by Amigos Bravos about LANL's revised proposed language reflecting 40 CFR 122.44 as exactly as possible, LANL's final proposed language for 20.6.4.14(A) changes the beginning of the second sentence to "In the case of pollutants or pollutant parameters for which there are no approved methods under 40 CFR Part 136...". This language is provided in LANL's concurrent filings, LANL's Corrected Final Proposed Amendments to 20.6.4.14(A) NMAC and LANL's Corrections to Hearing Officer Report.

consistency with the federal CWA. A rigorous, inclusive process is used to approve the 40 CFR Part 136 methods for use in compliance determinations and 401 certifications. Methods that do not survive that rigorous process are not appropriate for these uses.” LANL Exhibit 7 (Toll Direct) at 10:4-11.

In written rebuttal testimony, NMED, AB, BDD, and CCW/GRIP opposed LANL’s proposed amendment. Those comments are summarized here, generally all include reference to the flexibility of permit writers to use other appropriate methods, and provide the basis for LANL’s final proposed language for 20.6.4.14(A) NMAC, which responds to these comments.

NMED’s Ms. Lemon specifically pointed out that permit writers can specify an analytical method when there is no approved Part 136 method.

According to EPA’s Permit Writer’s Manual, without analytical methods for a pollutant or pollutant parameter, a permit writer can (and should) specify the analytical method to be used to evaluate compliance with the permit (NMED Exhibit 136). Federal regulations also allow for approval of alternative test methods (NMED Exhibit 111).

NMED Exhibit 106 (Lemon Rebuttal) at 7:21-8:1. Similarly, AB provided examples of LANL permits that included non-Part 136 methods.

States should have the authority and flexibility to select reliable sampling and analytical methods in order to ensure compliance with their water quality standards. . . It is important to point out that EPA’s current and draft LANL Wastewater and Stormwater Permits require LANL to monitor for PCBs using EPA Method 1668C. See EPA Draft LANL Wastewater Permit [Ex. 13] and EPA Draft LANL Stormwater Permit [Ex. 15]. In EPA’s view, therefore, Method 1668C is appropriate and lawful for use for permit compliance and enforcement even though it is not an approved Part 136 Method.

AB Exhibit 11 (Conn Rebuttal) at 5. AB witness, Dr. DeWitt, also noted the absence of Part 136 methods for sampling PFAS, the availability of Method 537.1 (acknowledging the need to modify Method 537.1 for surface water) and concluding that LANL’s proposal would not be protective. See AB Exhibit 17 (DeWitt Rebuttal) at 6-7. BDD expressed concern that LANL’s proposal would

be a “rollback” of current requirements. BDD Rebuttal NOI at 6-8. CCW/GRIP’s comments again center on flexibility in permit requirements:

[Dr. Toll] claims that only methods approved in 40 CFR 136 may be used for monitoring of NPDES permits, according to 40 CFR 122.44. These regulations do not tell states what they must adopt in the water quality standards; rather, they tell EPA what to include in NPDES permits. EPA apparently is of the opinion that its regulations allow for methods other than those included in 40 CFR 136. The pending draft NPDES permit for Los Alamos National Laboratory requires the use of “EPA published congener Method 1668 Revision and detection limits,” a method that is not included in 40 CFR 136.

CCW/GRIP Exhibit 5 (Homer Rebuttal) at 8.

At hearing, NMED’s Ms. Lemon, testified about both 20.6.4.12(E) NMAC and 20.6.4.14(A) NMAC. LANL’s proposed addition to 20.6.4.14(A) NMAC responds to the concerns raised by Ms. Lemon in her testimony regarding LANL’s related proposal to amend 20.6.4.12(E) NMAC (replacing the term “minimum quantification level” with “lowest minimum level (ML) of the analytical methods approved by EPA under 40 CFR part 136 for the measured pollutant or pollutant parameter”). Ms. Lemon testified regarding LANL’s proposal for 20.6.4.12(E) NMAC:

**Q.:** Could you please describe the concerns that the Department has regarding this proposed amendment?

**A.** It is commonly known that there are many pollutants, including toxic pollutants, that do not have EPA-approved analytical methods under 40 CFR 136. Currently, there are approximately 18 pollutants or pollutant parameters in the water quality standards which have criteria that protect human health and the environment and that do not have EPA-approved methods under 40 CFR 136. And there are still more pollutants that have an EPA-approved method under 40 CFR 136, but the method is not sensitive enough to evaluate against the criteria.

This is contradictory to the intent of the water quality standards, which is to protect public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act and the Clean Water Act. Triad and DOE's proposal removes any flexibility to specify or use alternative methods to evaluate compliance with the water quality standards.

**Q.:** Are alternative methods that are not EPA a-p-p-r-o-v-e-d methods under 40 CFR 136 allowed?

**A. Yes. A permit writer can specify the analytical method to be used to evaluate compliance with a permit. In addition, federal regulations allow for approval of alternative test methods. And finally, 20.6.4.14A NMAC as currently written provides a list of analytical methods that can be used in New Mexico.**

The methods listed in 20.6.4.14 NMAC may not be 40 CFR 136 methods, but they are available, approved, verified and validated methods that could be used to evaluate a water quality sample and develop criteria.

Tr. Vol III, 713:2-714:15 (Lemon Direct) (emphasis added).

LANL's revised proposal also responds to concerns expressed by Ms. Lemon regarding the prior version of LANL's proposal to amend 20.6.4.14(A) NMAC.

**Q.** And what concerns does the Department have regarding Triad and DOE's proposed amendment on this point?

**A.** It is commonly known that many pollutants, including toxic pollutants, do not have EPA-approved methods under 40 CFR 136. However, they may have other approved methods that can be used to analyze against the criterion. One such example is EPA Method 1668C, which is the only known and readily available analytical method that can evaluate compliance with New Mexico's PCBs criteria and any water quality-based effluent limits derived from those criteria.

As stated in my rebuttal testimony, submitted as NMED Exhibit 106, the list of pollutants with EPA-approved methods under 40 CFR 136 is much shorter and not equivalent to the list of pollutants with numeric criteria under 20.6.4.900 NMAC. These criteria are established at levels that protect human health and aquatic life, yet Triad and DOE are proposing to restrict analytical methods used for permit compliance and Clean Water Act Section 401 state certifications to, and I quote, those approved by EPA under 40 CFR Part 136 for the measured pollutant or pollutant parameter, unquote.

**Q.** Now, are alternative methods allowed to be used to evaluate compliance?

**A. Yes. According to EPA's Permit Writers' Manual, submitted as NMED Exhibit 136, a permit writer can specify the analytical method to be used to evaluate compliance with the permit. As demonstrated in NMED Exhibit 111, federal regulations also allow for approval of alternative test methods.**

Tr. Vol III, 718:5-719:11 (Lemon Direct) (emphasis added).

LANL's revised proposal is supported by extensive testimony from Dr. Toll at hearing, both in direct testimony and upon cross-examination. Specifically, the revised proposal reflects and is consistent with Dr. Toll's following testimony:

. . . the provisions of 20.6.4.12 NMAC specifically apply to determining compliance for enforcement purposes. And so that is the context in which my proposed amendment would apply. **Part 136 methods are not required for everything, but they are required when they exist to determine compliance for permit applications and reporting.**

Tr. Vol III, 766:7-13 (Toll) (emphasis added).

[Ms. Lemon's] testimony inaccurately characterizes what LANL is proposing. EPA and NMED can require the use of Alternative Test Procedures for analytes for which no Part 136 approved method exists.

Tr. Vol III, 771:20-772:4 (Toll Direct).

Ms. Sanchez also testified that based on her understanding of my testimony if the Triad-DOE proposed amendment to 20.6.4.12E NMAC and 20.6.4.14A NMAC are adopted, LANL would not be required to monitor for PFAS. That is a misunderstanding of my testimony. **ATPs, Alternative Test Procedures, may be used for analytes that have no Part 136 analytical method.** So the question of whether or not LANL will be required to monitor for PFAS is not collected -- not connected -- excuse me -- to LANL's proposed amendments to 20.6.4.12E NMAC and 20.6.4.14A NMAC.

Tr. Vol III, 777:6-16 (Toll Direct) (emphasis added).

Ms. Fox: You take the position in your testimony that according to 40 CFR 122.44 NMED may only use sampling methods under Part 136 **for NPDES compliance and 401 certifications** unless a method, as you have just indicated, is approved as an Alternative Test Procedure or has been adopted by a voluntary consensus standards body such as the US Geological Survey, correct?

. . .

Dr. Toll: Yes, it is.

I would like to add that there are some exceptions that rarely apply, and I did not incorporate the exceptions into my testimony, but my testimony is intended to say

the same thing as 122.44. And the exception is that there are some analytes, not the chemicals that we're usually worried about, for which the approved methods are published elsewhere in the Clean Water Act, not Part 136.

Tr. Vol III, 780:13-781:22 (Toll Cross) (emphasis added).

The revised proposal is consistent with Dr. Toll's testimony expressing the intent of LANL's revised proposal was merely to conform the standards with EPA regulations.

[Dr. Toll was asked to read from 40 CFR 122.44(i)(1)(iv)(B) by Ms. Fox]

...

Dr. Toll: Okay. "In the case of pollutants or pollutant parameters for which there are no approved methods under 40 CFR Part 136 or methods are not otherwise required under 40 CFR chapter I, subchapter N or O, monitoring shall be conducted according to a test procedure specified in the permit for such pollutants or pollutant parameters." **I don't disagree with that.**

Tr. Vol III, 790:7-14 (Toll Cross) (emphasis added).

[Ms. Fox] Q. You cite to that provision in the 8.8 -- 8.1.1 of the Permit Writers' Manual essentially for the proposition that states must use Part 136 methods; is that correct?

[Dr. Toll] A. Yes.

Q. If you could -- if you could look at the section highlighted in 8.3, titled Analytical Methods, and read that for the Hearing Officer and the Commission, please.

A. Okay. "The standard conditions of the permit [sections 122.41(j)(4) and 122.44(i)] require that, when available, permittees use test procedures specified in Part 136. The analytical methods contained in Part 136 are established for conventional, toxic (priority), and some nonconventional pollutants...Without analytical methods for a parameter, the permit writer should specify the analytical method to be used. There are also procedures to apply for approval of alternative test methods in accordance with Section 136.4." (As read.)

Q. So that states that without analytical methods for a parameter the permit writer should specify the analytical method to be used, correct?

A **Yes.**

Q. And then it says also, or in addition, there -- you can use alternative test methods. That's the Alternative Test Procedure you're talking -- you've been talking about, correct?

A. No. That's not what it says. It says there are procedures -- there are procedures to apply for approval of alternative test methods.

Q. In addition to the permit writer being able to specify the analytical method to be used, if it is not -- if there is not a Part 136 method; isn't that correct?

A. I don't understand the question. You're paraphrasing the last two sentences, and I'm not quite sure. I'm just looking at the last two sentences. And to me it says **if there's not an analytical method parameter, the permit -- the permit writer should specify the method to be used.** Then it says there are also procedures to apply for approval of alternative test methods in accordance with 136.4.

Q. And so would you agree that what that says is that if there are no Part 136 methods --

A. Um-hum.

Q. --a permit writer can specify the analytical method to be used --

A. **That's true.**

Q. -- or -- or there are procedures to apply for approval of an alternative test method?

A. Well, you're adding the "or." -- It's two --

Q. Yes, I am. Yes, I am. Would you agree with that -- with that as the meaning of what we just read?

A. No. I see them as two separate statements. It's informative for the permit writer to know about 136.4. It's telling the permit writer that they have a job to do, which is to specify the analytical method, and it's saying that there are procedures to apply for the approval of alternative test methods. Perhaps it should have been an "or" between those two. Perhaps there shouldn't have been an "also." I think that, you know, we could find out who the editor was for EPA, but I see them as two separate statements and can't draw the conclusion that you did about what it actually means.

Tr. Vol III, 792:11-795:2 (Toll Cross) (emphasis added).



LANL's revised proposal is also supported by Dr. Toll's testimony in the context of Ms. Fox's cross-examination of Dr. Toll about LANL Exhibit 85 (EPA memorandum dated November 22nd, 2020):

**Toll:** So it says "Generally, the permitting authority requires the use of methods approved at 40 CFR Part 136 for compliance with such monitoring requirements. If no approved methods are available at 40 CFR Part 136, then the permitting authority has discretion to specify the use of suitable methods."

**And yes. That statement is not inconsistent with my understanding of the law and the intent of my testimony.**

Tr. Vol III, 796:13-21 (Toll Cross) (emphasis added).

Other parties to these proceedings clearly understood the legal and evidentiary basis for LANL's final proposed language for 20.6.4.14(A) NMAC. Both AB and CCW/GRIP reference the relevant federal regulation in their closing arguments:

The Commission has the authority under State and federal law to require monitoring of PCBs using Method 1668C for compliance purposes. Moreover, federal Clean Water Act regulations provide: "In the case of pollutants or pollutant parameters for which there are no approved methods under 40 CFR part 136 or methods are not otherwise required under 40 CFR chapter I, subchapter N or O, monitoring shall be conducted according to a test procedure specified in the permit for such pollutants or pollutant parameters." 40 C.F.R. § 122.44(i)(1)(iv)(B) (2021).

CCW/GRIP Closing Brief at 15. *See* Amigos Bravos Statement of Reasons at 25, ¶ 108.

LANL's final proposed language for 20.6.4.14(A) NMAC does not parrot the federal regulation identically in order to provide context consistent with the New Mexico Standards.

### **III. CONCLUSIONS**

There is ample legal and evidentiary support for LANL's final proposed language for 20.6.4.7.T(2) NMAC and for 20.6.4.14(A) NMAC.

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I hereby certify that on January 5, 2022, a true and correct copy of the foregoing *Triad National Security, LLC and the United States Department of Energy's Notice of Compilation of Evidence* was served via electronic mail to the following:

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